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No.

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in the
Supreme Court
of the
United States

October Term, 1997

MICHAEL MOORE

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in finding that Petitioner's counsel was not ineffective for failing to appeal the incorrect base offense level of 38 which was given to the Petitioner?

II. Whether the Court of Appeals erred in finding that Petitioner's counsel was not ineffective for failing to appeal the denial of a downward reduction for the Petitioner's minimal participation in the conspiracy?

III. Whether the Court of Appeals erred in upholding the District Court's use of the 1993 guidelines in denying the Petitioner's original §2255 motion?

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MICHAEL MOORE

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner, Michael Moore, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on September 17, 1997.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit entered on September 17, 1997, under the caption United States v. Moore, was not printed due to Fourth Circuit Rule 36. That determination is attached hereto in Appendix 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 17, 1997. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court

is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTES INVOLVED

21 U.S.C. 846 Conspiracy to Distribute and to Possess with Intent to Distribute Heroin and Fentanyl

United States Sentencing Guidelines, Section 2D1.1(b)(1) Specific Offense characteristics - If a dangerous weapon was possessed, increase by two levels.

18 USC 924(c) Use of a Deadly or Dangerous Weapon During and in Relation to any Crime of Violence or Drug Trafficking Crime.

STATEMENT OF THE CASE

In a superseding indictment returned by the Grand Jury for the District of Maryland on August 11, 1992, the Appellant and eight other individuals were charged with eight offenses. The Appellant herein, Michael Moore, was charged with the following offense: Count I - conspiracy to distribute and possession with intent to distribute heroin and fentanyl. The Appellant and all co-defendant's were convicted of this count.

The District Court then sentenced all nine defendants on June 14, 1993. Michael Moore received a sentence of 292 months imprisonment. All the defendant's then filed a joint appellate brief on September 16, 1994. Their appeal was argued before the Fourth Circuit Court of Appeals on March 10, 1995. On Appeal, numerous issues raised concerning the legality of the wiretaps involved, the joinder of the defendants at trial, and the sentencing of

the defendants. However, counsel for Mr. Moore only raised the issue of insufficient evidence with regard to Mr. Moore's conviction. On April 21, 1995, the Fourth Circuit Court of Appeals affirmed the convictions of all the defendants. Mr. Moore's Petition for Writ of Certiorari to the United States Supreme Court was also denied.

Mr. Moore then filed a §2255 motion with the District Court. In this motion Mr. Moore raised the issues of ineffective assistance of counsel for failing to challenge his base offense level of 38 and failing to raise on appeal the issue his denial of minor participant status. This motion was denied by the District Court. The Petitioner then filed an appeal of this decision with the Fourth Circuit Court, appealing the issues of ineffective assistance and the use of incorrect sentencing guidelines. The Fourth Circuit denied this appeal per curium, on September

17, 1997. It is this denial that the Petitioner is appealing.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit Court of Appeals erred when it found that Petitioner's counsel was effective even though he did not raise two meritorious issues on appeal. Further, the District Court erred when it used the 1993 Sentencing Guidelines in denying the Petitioner's original 2255 motion. Therefore, Petitioner's due process rights under the Fifth Amendment to the United States Constitution were violated when he was sentenced based upon the incorrect Guidelines; and the Petitioner's Sixth Amendment right to effective assistance of counsel was also denied.

I. **THE COURT OF APPEALS ERRED WHEN IT DID NOT FIND THAT APPELLANT'S COUNSEL WAS INEFFECTIVE ON APPEAL FOR FAILING TO CONTEST THE BASE OFFENSE LEVEL OF 38 THAT WAS ERRONEOUSLY USED TO SENTENCE THE APPELLANT.**

The Appellant contends that counsel

was ineffective on appeal for failing to object to the base offense level used in assessing a sentence for the Appellant. To establish a claim of ineffective assistance of counsel, the Appellant must show that counsel's performance fell below an objective standard of reasonableness and that such deficient performance prejudiced the Appellant. United States v. Hoyle, 33 F.3d 415, 418 (4th Cir. 1994)(citing Smith v. Smith, 931 F.2d 242, 24 (4th Cir. 1991)(citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). Prejudice is shown when, but for counsel's deficient performance, there is a reasonable probability that the results of the proceeding would have been different. Id. "A reasonable probability is one that is sufficient to undermine confidence in the outcome." Id. Furthermore, the Fourth Circuit has noted the importance of the sentencing phase of a trial entitling a defendant to effective representation.

United States v. Breckenridge, 93 F.3d 132, 135(4th Cir. 1996)(citing United States v. Iaquinta, 719 F.2d 83, 85-86 (4th Cir. 1983); United States v. Burkley, 511 F.2d 47, 51 (4th Cir. 1975)). Any sentence imposed without effective representation must be vacated and reimposed to permit facts in mitigation of punishment to be fully and freely developed. Id. "Failure of counsel to object to an improper application of the sentencing guidelines may amount to ineffective assistance of counsel. Id. Likewise, a criminal defendant's right to effective assistance of counsel continues through direct appeal. Evitts v. Lucey, 469 U.S. 337 (1985). Finally, such issues concerning ineffective assistance are properly raised pursuant to a 28 U.S.C. §2255 motion where the record is properly developed to allow for review of such claims. United States v. Stockstill, 26 F.3d 492, 498 (4th Cir. 1994).

In the instant case, the Appellant can satisfy the two-prong Strickland ineffective assistance test. The Appellant was convicted in this case of conspiracy to distribute heroin and fentanyl pursuant to 21 U.S.C. §846. Because serious injury and deaths were reportedly linked to the fentanyl distributions the Appellant was assessed at sentencing a base offense level of 38 pursuant to U.S.S.G. §2D1.1(a)(2).

However, the text of §2D1.1(a)(1) specifically indicates that a conviction under 21 U.S.C.§846 does not allow an automatic base offense level of 38. §2D1.1(a)(1) states that a base offense level of:

> (1) 38, if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1),(b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.

The text and language of this particular Guideline are clear that only convictions under the specified statutes in conjunction

with death or serious bodily injury require a base offense level of 38. Importantly, at the sentencing hearing the judge admitted that his assessment of the 38 Base Offense Level for the 21 U.S.C. §846 conviction was based on an assumption that could very well be wrong, in which case he would be re-sentencing the defendants in a couple of years. The judge indicated that he was concerned with the absence of 21 U.S.C. §846 within U.S.S.G. §2D1.1(a)(2) but noted that the Court of Appeals would work out this issue. In fact, the Sentencing Judge noted that he was sure this issue was headed for the Court of Appeals. However, despite these inconsistencies in the Guidelines and the sentence imposed, in addition to the comments of the sentencing judge, no mention of this issue was raised on appeal. Appellate counsel failed to raise issues which were highlighted by the District Court as issues requiring the review of the

Court of Appeals. As such, counsel's conduct fell below that level needed to constitute objectively reasonable assistance. Reasonable counsel would have noted the judge's uncertainty in such a crucial area of sentencing and would have sought review in the Court of Appeals to ensure the correct treatment of his client.

Likewise, there is a reasonable probability that, but for counsel's errors the results of the proceeding would have been different. The text of the Guidelines omit any mention of 21 U.S.C. §846 convictions while listing various categories of other convictions. Furthermore, §2D1.1(a)(2) does not mention those who are sentenced under 21 U.S.C. §841(b)(1)(A), §841(b)(1)(B), or §846b(1)(C), but specifies only those convicted under those sections. Given this inclusion of certain statutes, the

exclusion of §846 evinces an intent to omit that section from the penalty provisions. Furthermore, there is a reasonable explanation to the omission of §846, other than Congressional Committee oversight. The heightened death or serious bodily harm penalties were only meant for those individuals convicted of actually distributing the fatal drug to the victim, not those individuals who were convicted upon the attendant conspiracy indirectly related to the drugs. These heightened penalties require a closer culpability than that possessed by simple co-conspirators who may have contributed just enough to be considered a part of the conspiracy, but not enough to be connected under §2D1.1(a)(2). Given this clear language, as well as the reasonable purpose behind the statute, 21 U.S.C. §846 should not be counted as one of the convictions requiring application of U.S.S.G. §2D1.1(a)(2).

Therefore, because counsel's conduct

fell below that needed to qualify as objectively reasonable conduct, in addition to the reasonably probability that but for counsel's errors the results of the proceeding would have been different, the Appellant was denied his Sixth Amendment right to effective assistance of counsel. As such, the Appellant's conviction should be vacated and remanded in order that proper Guidelines to be applied and a correct sentence to be imposed.

II. THE COURT OF APPEALS ERRED WHEN IT DID NOT FIND THAT APPELLANT'S COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON APPEAL THE DENIAL OF A REDUCTION FOR MINIMAL/MINOR PARTICIPATION IN THE DRUG CONSPIRACY.

The Appellant can also satisfy the two-prong Strickland ineffective assistance test for counsel's failure to appeal the denial of minor participation reduction in his base offense level.

Under §3B1.2 of the Sentencing Guidelines, a reduction in the offense level may be made for a minimal or minor participant in the conspiracy. A four-

level decrease is allowed for a minimal participant if that person is plainly among the least culpable of those involved in the conduct of the group. United States v. Reavis, 48 F.3d 763, 769 (4th Cir. 1995); U.S.S.G. §3B1.2, comment n.1. Although this adjustment should be used infrequently, a defendant's lack of understanding of the scope, structure, and activities of the conspiracy is indicative of a role as a minimal participant. Id. Furthermore, a defendant only is entitled to a reduction where his participation is extremely limited within the conspiracy, such as committing only one act in furtherance of the conspiracy. Id.

A reduction for minor participation is also allowed for those who are less culpable than most other participants, but whose role could not be described as minimal. Id.; U.S.S.G. §3B1.2. For those defendants who fall between the minor and minimal participation classification, a

three-point reduction in the Base Offense Level is appropriate. Id.

In the instant case, the Appellant was clearly a minor, if not minimal, participant in the drug conspiracy. As such, counsel was unreasonably deficient in failing to raise the reduction's denial on appeal. Although counsel argued the insufficiency of the evidence to support the Appellant's conviction, counsel failed to use that lack of evidence to show minimal participation on the part of the Appellant. The evidence at trial convicting the Appellant consisted solely of a limited number of phone calls in which the name Mike Moore was raised. However, instead of showing an active part in the conspiracy, these intercepted calls showed that the Appellant owed money to one of the other co-defendants. Furthermore, the evidence indicated that the Appellant was a buyer of drugs from the conspiracy and had no part in the planning, scope, structure,

or activities of the group. In fact, evidence at trial indicated one of the co-defendants was so irritated at the Appellant's repeated requests for drugs that he sought to have his telephone number changed. Further evidence indicated that the co-defendants did not want anything to do with the Appellant and would avoid taking his calls asking to purchase drugs.

This evidence indicates that the Appellant, although a buyer of drugs from the conspiracy, was not a full-fledged member of the group. The Appellant had no control over the group and was not involved in any planning or activities outside of purchasing drugs from the group. In fact, the Appellant had trouble even purchasing from the group as the drug conspirators wanted nothing to do with him. Given this evidence, the Appellant was only a minimal participant in the conspiracy -- if a member at all. Furthermore, even if not a minimal participant, the Appellant was at

the least a minor participant entitling him to a two-point departure or the three-point departure for in-between the minor and minimal categories.

Therefore, given the minimal role that the Appellant played in the conspiracy, counsel should have raised such issues on appeal. However, despite the strength of such an argument, no mention was made on appeal of the Appellant's status in the group. Given this failure, counsel's conduct falls below that standard of conduct needed to constitute effective assistance of counsel. As such the Appellant's was denied his right to effective representation in violation of the Sixth Amendment. The Appellant respectfully requests that his sentence be vacated so that the correct mitigating circumstances may be raised in assessing a new correct sentence of incarceration.

III. THE APPEALS COURT ERRED WHEN IT FOUND THAT THE DISTRICT COURT PROPERLY USED THE 1993 SENTENCING GUIDELINES IN DECIDING TO DENY THE APPELLANT'S §2255

MOTION.

"As a general rule, a defendant's sentence should be based upon the Guidelines "in effect on the date the defendant is sentenced"." United States v. Heater, 63 F.3d 311, 331 (4th Cir. 1995), quoting United States v. Hartzog, 983 F.2d 604, 608 (4th Cir. 1993). In the present case, this rule would mean that the Appellant was sentenced on June 14, 1993 and, therefore, the 1993 Guidelines should apply, which was what the Court used in denying the Appellant's §2255 motion.

However, there is an exception to this general rule. The conduct of the instant offense and the Appellant's indictment occurred in 1992. This Circuit has previously held "that amendments to the Guidelines occurring after a defendant's offense but before sentencing should not be applied if doing so would increase the sentence, because that would violate the Ex Post Facto clause in Article I, Sec. 9 of

the United States Constitution." Hartzog, at 331, cites omitted.

The Appellant was sentenced pursuant to U.S.S.G. §2D1.1. In the 1993 Sentencing Guidelines, the edition used by this court in denying the Appellant's §2255 motion, the crimes of Conspiracy and Attempt are included in this section. However, the 1992 edition of the Sentencing Guidelines do not contain this provision. Therefore, by relying on the 1993 Guidelines, this Court has improperly increased the Appellant's sentence and improperly denied his §2255 motion.

CONCLUSION

The Fourth Circuit in the instant case erred when it determined that the Petitioner's counsel had assisted him effectively, even though he failed to appeal two meritorious issues. Further, the Fourth Circuit and the District Court denied the Petitioner of his Due Process Rights when they used the 1993 Guidelines in the denial of his original 2255 motion .

Wherefore the Petitioner, Michael Moore respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

1 FOURTH CIRCUIT COURT OF APPEALS ORDER
September 17, 1997

2 SUPERSEDING INDICTMENT

3 FOURTH CIRCUIT COURT OF APPEALS ORDER
April 21, 1995

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-6750

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL K. MOORE,

Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, District Judge. (CR-92-301-S, CA-97-1351-S)

Submitted: August 28, 1997

Decided: September 17, 1997

Before WILKINS, WILLIAMS, and MICHAEL, Circuit Judges.

Dismissed by unpublished per curiam opinion

Keith Eric Golden, GOLDEN, MEIZLISH & ELWOOD CO., L.P.A., Columbus, Ohio, for Appellant. Brent Jefferson Gurney, Assistant United States Attorney, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant seeks to appeal the district court's order denying his motion filed under 28 U.S.C.A. s. 2255 (West 1994 & Supp. 1997). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. United States v. Moore, Nos. CR-92-301-S; CA-97-1351-S (D. Md. Apr. 28, 1997). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	Criminal No: S-92-0301
v.	:	
CARLOS ORTIZ,	:	(Conspiracy to Distribute and
HENRY JONES,	:	Possess with
ERIC MOORE,	:	Intent to Distribute
MALE LEWIS, aka "DOC,"	:	Fentanyl and Heroin, 21 U.S.C. s. 846;
FRANKIE SANCHEZ,	:	Possession with
TURONN LEWIS,	:	Intent to Distribute
RONALD WILLIAMS, aka "DEADEYE,"	:	Fentanyl, 21 U.S.C. s. 841(a)(1);
ARNOLD MURDOCK aka "PUTT,"	:	Possession with Intent to Distribute
MICHAEL MOORE,	:	Heroin, 21 U.S.C.
ADRIAN SCOTT,	:	s. 841(a)(1); Using
SANETTE CURRY,	:	Carrying a Firearm
GLADYS SANCHEZ	:	in Relation to a Drug Trafficking
	:	Crime, 18 U.S.C.
	:	s. 924(c);
	:	Continuing Criminal Enterprise,
	:	21 U.S.C. s. 848(a);
	:	Aiding and Abetting,
	:	18 U.S.C. s. 2)

.....

INDICTMENT

The Grand Jury for the District of Maryland charges:

Beginning in 1991, and continuing therefore up to and including May 2, 1992, within the State and District of Maryland, the State of New York, and elsewhere,

CARLOS ORTIZ,
HENRY JONES,
ERIC MOORE,
MALE LEWIS, aka "DOC,"
FRANKIE SANCHEZ,
TURONN LEWIS,
RONALD LEWIS, aka "DEADEYE,"
ARNOLD MURDOCK, aka "PUTT,"
MICHAEL MOORE,
ADRIAN SCOTT,
SANETTE CURRY,
and
GLADYS SANCHEZ

the defendants herein, did unlawfully, knowingly, and willfully combine, conspire, confederate and agree among themselves and other persons, known and unknown to the Grand Jury, to unlawfully and intentionally distribute and possess with intent to distribute a mixture or substance containing a detectable amount of heroin, a

Schedule I Narcotic Controlled Substance; and a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, commonly known as "fentanyl," a Schedule II Narcotic Controlled Substance, in violation of Title 21 United States Code, s. 841(a)(1).

21 U.S.C. s. 846

COUNT TWO

And the Grand Jury for the District of Maryland further charges that:

On or about March 15, 1992, in the State and District of Maryland, and elsewhere

HENRY JONES,
ARNOLD MURDOCK,
ADRIAN SCOTT,
and
SANETTE CURRY

the defendants herein, did knowingly, intentionally and unlawfully possess with intent to distribute a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, commonly known as "fentanyl," a Schedule II Narcotic Controlled Substance, in violation of Title 21 United States Code s. 841(a)(1).

21 U.S.C. s. 841(a)(1)
18 U.S.C. s. 2

COUNT THREE

And the Grand Jury for the District of Maryland further charges that:

On or about March 29, 1992, in the State and District of Maryland, and elsewhere

CARLOS ORTIZ,
ERIC MOORE,
ARNOLD MURDOCK, aka "PUTT,"
FRANKIE SANCHEZ,
TURONN LEWIS,
and
GLADYS SANCHEZ

the defendants herein, did knowingly, intentionally and unlawfully possess with intent to distribute a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, commonly known as "fentanyl," a Schedule II Narcotic Controlled Substance, in violation of Title 21 United States Code s. 841(A)(1).

21 U.S.C. s. 841(a)(1)
18 U.S.C. s. 2

COUNT FOUR

And the Grand Jury for the District of Maryland further charges that:

On or about May 2, 1992, in the State and District of Maryland, and elsewhere

CARLOS ORTIZ,
HENRY JONES,
ERIC MOORE,
MALE LEWIS aka "DOC,"
FRANKIE SANCHEZ,
TURONN LEWIS,
and
RONALD WILLIAMS

the defendants herein, did knowingly, intentionally and unlawfully possess with intent to distribute a mixture or substance containing a detectable amount of heroin, a Schedule I Narcotic Controlled Substance, in violation of Title 21 United States Code, s. 841(a)(1).

21 U.S.C. s. 841(a)(1)
18 U.S.C. s. 2

COUNT FIVE

And the Grand Jury for the District of Maryland further charges that:

On or about May 2, 1992 in the State and District of Maryland,

FRANKIE SANCHEZ

the defendant herein, did knowingly and intentionally use and carry a firearm, that is: an Armi Fratelli Tanfoglio 9mm semi-automatic pistol, serial number G08277, model BTA-90, during and in relation to drug trafficking crimes, that is conspiracy to distribute and possess with intent to distribute heroin, a Schedule I controlled substance; and fentanyl, a Schedule II controlled substance.

18 U.S.C. s. 924(c)

COUNT SIX

And the Grand Jury for the District of Maryland further charges that:

On or about May 2, 1992 in the State and District of Maryland,

HENRY JONES

the defendant herein, did knowingly and intentionally use and carry a firearm, that is: an Astra Model A80 .45 caliber pistol, serial number H4564, during and in relation to drug trafficking crimes, that is conspiracy to distribute and possess with intent to distribute heroin, a Schedule I controlled substance; and fentanyl, a Schedule II controlled substance.

18 U.S.C. s. 924(c)

COUNT SEVEN

And the Grand Jury for the District of Maryland further charges that:

From in or about 1991 and continuously thereafter up to and including May 2, 1992, in the State and District of Maryland, New York, and elsewhere,

CARLOS ORTIZ

the defendant herein, did knowingly, intentionally and unlawfully engage in a continuing criminal enterprise in that he did on numerous occasions violate Title 21 United States Code, sections 841 and 846, which violations include, but are not limited to, Counts I, II, III, and IV of this indictment, which violations are part of a continuing series of violations of the controlled substance laws of the United

States and were undertaken by **CARLOS ORTIZ**, the defendant, in concert with at least five other persons with respect to whom he occupied a position of organizer, supervisor, and manager and from which continuing series of violations he obtained substantial income and resources.

21 U.S.C. s. 848(a)
18 U.S.C. s. 2

s/_____
Richard D. Bennett
United States Attorney

A TRUE BILL:

s/_____
Foreperson

8-11-92
Date

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARLOS ORTIZ,
Defendant-Appellant.

No. 93-5473

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD WILLIAMS, a/k/a Deadeye,
Defendant-Appellant.

No. 93-5474

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARNOLD MURDOCK, a/k/a Putt,
Defendant-Appellant.

No. 93-5475

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL MOORE,
Defendant-Appellant.

No. 93-5476

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ADRIAN SCOTT,
Defendant-Appellant.
No. 93-5477

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
TURONN LEWIS,
Defendant-Appellant.
No. 93-5478

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRANKIE SANCHEZ,
Defendant-Appellant.
No. 93-5488

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HENRY JONES, a/k/a Kenneth Dixon,
Defendant-Appellant.
No. 93-5504

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MALE LEWIS, a/k/a Doc,
Defendant-Appellant.

No. 93-5505

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CR-92-301-S)

Argued: March 10, 1995

Decided: April 21, 1995

Before WIDENER, WILKINS, and HAMILTON,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Antonio Gioia, Baltimore, Maryland; Harvey Greenberg, Towson, Maryland, for Appellants. Brent Jefferson Gurney, Assistant United States Attorney, Greenbelt, Maryland, for Appellee. **ON BRIEF:** Paul M. Weiss, Baltimore, Maryland, for Appellant Ortiz; William S. Little, STARK & LITTLE, Baltimore, Maryland, for Appellant Williams; Richard D. Paugh, Rockville, Maryland, for Appellant Moore; Linwood P. Hedgepeth, Baltimore, Maryland, for Appellant Turonn Lewis; Catherine Flynn, Luther C. West, WEST, FRAME & BARNSTEIN, Baltimore, Maryland, for Appellant Sanchez; David L. Zeiger, Baltimore, Maryland, for Appellant Jones;

David P. Henninger, GLASS & HENNINGER, Towson, Maryland, for Appellant Male Lewis. Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Carlos Ortiz, Ronald Williams, Arnold Murdock, Michael Moore, Adrian Scott, Turonn Lewis, Frankie Sanchez, Henry Jones, and Male Lewis were convicted of conspiring to distribute and to possess with the intent to distribute heroin and fentanyl. *See* 21 U.S.C.A. § 846 (West Supp. 1994).[1] They appeal their convictions and sentences alleging numerous errors. We affirm.

I.

Appellants were tried together on various charges arising out of their involvement in a Baltimore, Maryland conspiracy to distribute heroin and fentanyl. The investigation of Appellants began after an inquiry into another Baltimore drug distribution conspiracy led law enforcement officers to discover that Jones was supplying heroin to that group. Police ultimately obtained a number of authorizations for wiretaps on telephones linked to various Appellants. The information obtained from monitoring conversations on these telephones led law enforcement officers to intercept two shipments of drugs to the group, leading to two substantive counts of possession with the intent to distribute. The principal charge, however, was one of conspiracy of which all of the Appellants were convicted.

---

[1]Various Appellants were also convicted of substantive charges of possession with the intent to distribute. *See* 21 U.S.C.A. § 841(a) (West 1981).

Seven of the Appellants received life sentences pursuant to a statutory mandatory minimum sentence, *see* 21 U.S.C.A. § 841(b) (West Supp. 1994), or pursuant to the sentencing guidelines, *see* United States Sentencing Commission, *Guidelines Manual*, § 2D1.1(a) (Nov. 1992). The two remaining Appellants, Male Lewis and Michael Moore, received 292-month sentences.

II.

Appellants principally contend that the district court applied an incorrect standard of review in assessing whether there was sufficient information to support the application for the wiretaps. Asserting that de novo review is appropriate, they claim that when so reviewed the information submitted is not sufficient to establish probable cause or the exhaustion of other normal investigative procedures. *See* 18 U.S.C.A. § 2518(3) (West 1970 & Supp. 1994). We reject this argument.

It is well settled that the judge to whom the application for a wiretap is made

> is in the best position to determine if probable cause has been established in light of the circumstances as they appear at the time. . . . Great deference is normally paid to such a determination by the issuing judge, and our role is to determine whether the issuing court had a substantial basis for concluding that electronic surveillance would uncover evidence of wrongdoing.

United States v. DePew, 932 F.2d 324, 327 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991). The district court reviewed the decision of the issuing judge to determine whether a substantial basis for the probable cause determination existed; thus, it did not err in failing to review the probable cause determination de novo. And, applying this appropriately deferential standard of review, we cannot conclude that the issuing judge lacked a substantial basis for concluding that the wiretaps would uncover evidence of wrongdoing.

The finding that alternative investigative techniques have failed or are unlikely to succeed without the requested wiretaps is reviewed for

an abuse of discretion. *United States v. Carneiro*, 861 F.2d 1171, 1176 (9th Cir. 1988). "[T]he showing of need is tested in a practical and common sense fashion and not in an overly restrictive manner that would unduly hamper the investigative powers of law enforcement agents." *DePew*, 932 F.2d at 327. The affidavit submitted in support of the request for the wiretaps set forth in detail the other investigative techniques that had been used or considered for use and why those techniques had proven or would likely be unsuccessful. Accordingly, we conclude that the issuing judge did not abuse his discretion in determining that "normal investigative procedures ha[d] been tried and ha[d] failed or reasonably appear[ed] to be unlikely to succeed if tried or [were] too dangerous." 18 U.S.C.A. § 2518(3)(c).

III.

In challenging their sentences, Appellants first maintain that the guidelines promulgated by the United States Sentencing Commission are unconstitutional because they undermine the integrity of the judiciary, and hence are violative of the separation-of-powers principle, and because the guidelines deny them due process in violation of the Fifth Amendment. Appellants essentially ask this court to hold that because greater experience with the guidelines since the Supreme Court decided *Mistretta v. United States*, 488 U.S. 361 (1989) (holding that the guidelines do not violate the separation-of-powers principle), and since this court decided *United States v. Bolding*, 876 F.2d 21 (4th Cir. 1989) (holding that the guidelines do not deprive defendants of due process), has demonstrated that the guidelines embrace political judgments, this court should ignore these prior decisions. Of course, we may not ignore them and consequently reject this argument as frivolous.

In addition, Appellants argue that their sentences were disproportionate and therefore violate the Eighth Amendment. No proportionality review is appropriate for sentences less than life without the possibility of parole. *United States v. Polk*, 905 F.2d 54, 55 (4th Cir.), *cert. denied*, 498 U.S. 985 (1990). And, this court has indicated that a life sentence is not disproportionate to the conduct of "'drug dealers [who] themselves sentence many individuals to a lifetime of addiction and dependency.'" *United States v. D'Anjou*, 16 F.3d 604, 613 (4th Cir.) (quoting *United States v. Meirovitz*, 918 F.2d 1376, 1381 (8th

Cir. 1990), *cert. denied*, 502 U.S. 829 (1991)), *cert. denied*, 114 S. Ct. 2754 (1994); *see also Harmelin v. Michigan*, 501 U.S. 957 (1991) (mandatory life sentence without possibility of parole for possession of 672 grams of cocaine did not violate the Eighth Amendment). Moreover, the activities engaged in by the conspiracy also led to the deaths of numerous individuals who ingested fentanyl distributed by Appellants. Accordingly, we conclude that the life sentences are not disproportionate.

The Appellants who received life sentences next contend that the district court erred in concluding that mandatory minimum life sentences were required under 21 U.S.C.A. § 841(b)(1)(A) and that a base offense level of 43 or 38 was indicated by U.S.S.G. § 2D1.1(a)(1)-(2).[2] Appellants' sole argument is that the district court was required to find that it was reasonably foreseeable to each of them that death would result from their activities. They do not claim that the finding of the district court that the fentanyl distributed by the conspiracy caused numerous deaths in the Baltimore area was clearly erroneous. Nor do they dispute the finding of the district court that the distribution of fentanyl by members of the conspiracy was within the scope of their agreements and reasonably foreseeable to them. Instead, Appellants exclusively maintain that the district court erred in applying the statutory mandatory minimum sentence and/or § 2D1.1(a)(1)-(2) because the district court did not find that the resulting deaths were reasonably foreseeable to them.

[2]A district court is required to impose a mandatory minimum life sentence under § 841(b)(1)(A) when certain prescribed quantities of drugs are involved in the offense and the defendant commits the present offense "after a prior conviction for a felony drug offense has become final, . . . and . . . death or serious bodily injury results from the use of such substance." Section 2D1.1(a)(1) provides that a defendant should be assigned a base offense level of 43 when the penalty provisions of § 841(b)(1)(A) are applicable and "death or serious bodily injury resulted from the use of the substance and . . . the defendant committed the offense after one or more prior convictions for a similar offense." Section 2D1.1(a)(2) provides that a defendant should be assigned a base offense level of 38 when the penalty provisions of § 841(b)(1)(A) are applicable and "death or serious bodily injury resulted from the use of the substance."

Appellants' argument has recently been rejected by this court in *United States v. Patterson*, 38 F.3d 139, 144-46 (4th Cir. 1994), *petition for cert. filed*, No. 94-7831 (U.S. Jan. 23, 1995). *Patterson* held that the plain language of § 841(b) does not require that the district court find that death which resulted from the distribution was reasonably foreseeable to the defendant. *Id.* Further, in the context of a conspiracy conviction, the district court must find only that the conduct that led to the death, *i.e.*, the distribution of the illegal drugs that caused the death, was reasonably foreseeable—not that the resulting death itself was reasonably foreseeable. *Id.*

The references to § 841(b) in § 2D1.1(a) make plain that this guideline merely incorporates the standard applicable under § 841(b) into the guideline framework; thus, a finding that death resulted from conduct that was within the scope of the agreement and was reasonably foreseeable to the individual conspirators is sufficient to render § 2D1.1(a)(1)-(2) applicable, assuming of course that the other provisions of the guideline are satisfied. Consequently, we find Appellants' argument concerning the application of these provisions lacks merit.

IV.

We have considered each of the remaining arguments raised by Appellants and find them to be without merit. Accordingly, we affirm their convictions and sentences.

AFFIRMED

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

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in the
Supreme Court
of the
United States

October Term, 1997

MICHAEL MOORE

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	**Crim. No. S 92-0301**
	*	
v.	*	**Civil No. S 97-1351**
	*	
MICHAEL MOORE	*	
	*	

* * * * * * * * * * * *

ORDER

For the reasons stated in a Memorandum Opinion entered this date, it is, by the Court, ORDERED:

1. That movant's counsel BE, and hereby IS, ADMITTED PRO HAEC VICE for the purposes of this motion;

2. That movant's motion for relief pursuant to 28 U.S.C. sec. 2255 BE, and it hereby IS, SUMMARILY DENIED AND DISMISSED, pursuant to Rule 4(b), Rules Governing Section 2255 Cases; and

3. That copies hereof and of the said Opinion be mailed to counsel for the movant and to the United States Attorney for this District.

/s/
Frederic N. Smalkin
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	**Crim. No. S 92-0301**
v.	*	**Civil No. S 97-1351**
MICHAEL MOORE	*	

* * * * * * * * * * *

MEMORANDUM OPINION

This is a motion under 28 U.S.C. sec. 2255, filed by a federal prisoner, with the assistance of counsel, whom the Court hereby admits pro haec vice to pursue this motion. In that the motion, on its face and together with the files and records of the Court, shows that the movant is plainly entitled to no relief in this Court, a separate order will be made for its summary denial pursuant to Rule 4(b), Rules Governing Section 2255 Cases.

The movant, along with a number of others, was convicted, inter alia, of conspiracy to distribute a controlled substance under 21 U.S.C. sec. 846. Because deaths resulted foreseeably from

the conspiracy, the defendant (and others) had his sentence enhanced under U.S.S.G. sec. 2D1.1(a)(2). Additionally, he was denied a decrease in offense level under U.S.S.G. sec. 3B1.2 for mitigating role. Although an appeal was pursued by counsel on other issues, no appeal was pressed as to either of these sentencing issues.

The present motion, in the realization that these issues are foreclosed from collateral review on the merits by their failure to have been raised on appeal, casts them in the light of violations of the right to effective assistance of counsel on appeal. Nonetheless, and even so cast, the contentions are utterly without merit.

First, although the Court expressed a good deal of frustration with the clumsiness of the Sentencing Guidelines at sentencing, the duty of appellate advocacy applicable under the Sixth Amendment did not require counsel to pursue the issue of

whether U.S.S.G. sec. 2D1.1(a)(2)'s enhancement applies to convictions under 21 U.S.C. sec. 846. Appellate counsel is entitled to a "strong presumption of competence," Evans v. Thompson, 881 F.2d 117, 124 (4th Cir. 1989), especially when it comes to sorting out appellate wheat from appellate chaff. Jones v. Barnes, 463 U.S. 745 (1983). The presumption of attorney competence here is strengthened by the fact that, of the many excellent attorneys who pursued the direct appeal from their clients' sentences in this case, none of them though this issue worthy of an appeal. This is strongly suggestive that it was not outside the bounds of reasonable representation for Mr. Moore's counsel not to have raised the issue. Strickland v. Washington, 466 U.S. 668 (1984). Furthermore, there was no likelihood of success on the issue anyway, in light of the fact that 21 U.S.C. sec. 846 as amended post-Bifulco by Pub.L. 100-690 incorporates

all punishments for the substantive drug object offense into the conspiracy charge. In fact, the Fourth Circuit itself put paid to this issue in the opinion affirming this defendant's conviction, when it observed that the enhancement of U.S.S.G. sec. 2D1.1(a)(2) is applicable "when the penalty provisions of sec. 841(b)(1)(A) are applicable and 'death or serious bodily injury resulted from the use of the substance.'" United States v. Moore, No. 93-5476, slip op. at 2 n.2 (4th Cir. April 21, 1995). If that esteemed court had thought the offense of conviction, rather than the penalty provision, had to be 21 U.S.C. sec. 841, rather than sec. 846, for a sec. 2D1.1(a)(1) enhancement, it could -- - and undoubtedly would -- have said so. It did not. There was, then, no Strickland prejudice. End of discussion as to the first contention.

Movant's second contention is easily disposed of. The Sixth Amendment, as

interpreted in Strickland, did not require counsel to appeal from the denial of a role mitigation adjustment under sec. 3B1.2. The record plainly demonstrated that this movant was not less culpable than "most other participants" or was only minimally culpable. Under these circumstances, this Court's determination could only be revisited on appeal for clear error or abuse of discretion, see, e.g., United States v. Avers, 84 F.3d 382 (10th Cir. 1996). There is no possibility that such a claim could have prevailed on appeal in this case, and, thus, there was neither a lack of competence in not raising it nor any prejudice therefrom, both in the Strickland sense.

For the stated reasons, an order will be entered separately, summary dismissing the present motion.

Dated: April 28, 1997

/s/
Frederic N. Smalkin
U.S. District Judge